

1. Does K.S.A. 44-523(f) provide for dismissal without prejudice within the discretion of the ALJ?
2. Was the order for dismissal properly made when there was no notice of a hearing, no opportunity for a hearing prior to the order of dismissal, no factual findings prior to the order of dismissal, and no statement of factual findings relied upon set forth in the order of dismissal?
3. Is K.S.A. 44-523(f), as written, void for violating due process by failing to require notice and a hearing before a case is dismissed considering the strict interpretation required by *Casco v. Armour Swift-Eckrich*, 283 Kan. 508 (2007)?

4. Did the Agency violate due process requirements when dismissing the case without first giving notice to claimant of the intention to dismiss and a reasonable opportunity for claimant to be heard as required by *Doe v. Kansas Dep't of Human Res.*, 277 Kan. 795, 807-08 (2004)?
5. Can K.S.A. 44-523(f) be retroactively applied to a claim mainly based upon a series of repetitive or cumulative injuries occurring before July 1, 2006 when K.S.A. 44-523(f) became effective?¹
6. Does K.S.A. 44-523(f) violate equal protection because it treats injured workmen differently than other civil litigants who have suffered injuries caused by negligence of others by denying them the notice and an opportunity for a hearing as provided by K.S.A. 60-241?
7. All issues found adversely to claimant.

Claimant's brief lists four issues:

1. K.S.A. 44-523(f) provides for dismissal without prejudice. Alternatively, it provides the ALJ discretion to dismiss without prejudice.
2. Was the order of dismissal properly made when there was no notice of a hearing, no opportunity for a hearing prior to the order of dismissal, no factual findings prior to the order of dismissal, and no statement of factual findings relied upon set forth in the Order of Dismissal?
3. Did the Agency violate due process requirements when dismissing the case without first giving notice to claimant of the intention to dismiss and a reasonable opportunity for claimant to be heard as required by *Doe v. Kansas Dep't of Human Res.*, 277 Kan. 795, 807-08 (2004)?
4. Does K.S.A. 44-523(f) as written violate due process and equal protection?

Claimant also raised other arguments in his brief.²

¹ Issue 5 raised by the claimant was not briefed. Even if it were raised, our file shows a single accident was alleged as occurring on October 24, 2006, not a series of repetitive or cumulative injuries that may have occurred before July 1, 2006, the effective date of K.S.A. 2006 Supp. 44-523(f).

² Such arguments include: (1) K.A.R. 51-3-1, which was last amended June 21, 2002, does not allow K.S.A. 2006 Supp. 44-523(f) to function as dismissing a claim with prejudice because to do so would be to add a new method of claim termination to the five exclusive methods of termination listed in the administrative regulation; (2) K.S.A. 2006 Supp. 44-523(f) is vague and ambiguous; (3) K.S.A. 2006 Supp. 44-523(f) should only be viewed as a docket clearing mechanism that allows a claim to be pursued later and not a statute of limitations that forever bars the claim; (4) because K.S.A. 2011 Supp. 44-523(f) has new language providing for dismissal with prejudice, it shows a change from the language of K.S.A. 2006 Supp. 44-523(f), such that the latter does not provide for dismissal with prejudice; (5) K.S.A. 2006 Supp. 44-523(f) and K.S.A. 44-551(i)(1) do not permit a judge to dismiss a claim with prejudice (however, claimant later argues K.S.A. 2006 Supp. 44-523(f) should be construed to allow a judge to dismiss a claim with or without prejudice); and (6) the "good cause shown" provision in K.S.A. 2006 Supp. 44-523(f) requires determination of facts.

Respondent maintains the Order should be affirmed, noting K.S.A. 2006 Supp. 44-523(f) clearly and unambiguously requires a judge to dismiss the claim.

We cannot address whether K.S.A. 2006 Supp. 44-523(f) is unconstitutional. For the sake of brevity, only one issue need be addressed: does due process require a hearing in which claimant is provided notice of the issue to be addressed and a meaningful opportunity to be heard?

FINDINGS OF FACT

There was no transcript upon which the Board can make any findings of fact.

Otherwise, claimant alleged having an accidental injury on October 24, 2006. An application for hearing for such accidental injury was filed with the Division of Workers Compensation on February 13, 2007. On May 2, 2008, Thomas R. Phillips, M.D., evaluated claimant, by prior order of the judge, and suggested claimant undergo a right total hip arthroplasty. On August 7, 2008, the judge entered an order for medical treatment with Dr. Phillips and payment of temporary partial disability benefits.

On May 14, 2014, claimant sent a letter to the judge and respondent's counsel confirming that a prehearing settlement conference was scheduled to occur on June 4, 2014. It appears the judge asked respondent's counsel to prepare an order dismissing the claim. Such order was prepared and presented to the judge, who signed it on June 5, 2014. Over seven years and three months passed between the time the application for hearing was filed and the claim being dismissed.

On June 10, 2014, claimant filed a Motion for Reconsideration. Claimant sought Board review on June 16, 2014.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2006 Supp. 44-523(f) states:

Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

Most of claimant's arguments concern due process. The Kansas Constitution requires that all parties receive procedural due process of law.³ The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case.⁴ To satisfy due process, notice must be reasonably calculated, under all of the circumstances, to apprise the interested parties of the pendency of an action and to afford the parties an opportunity to present any objections.⁵ A lack of notice of a hearing is a denial of due process.⁶

No particular form of proceeding is required to constitute due process in administrative proceedings. All that is required is that the liberty and property of the citizen be protected by rudimentary requirements of fair play. Its requirements include notice and the opportunity to be heard, the revelation of the evidence on which a disputed order is based, an opportunity to explore that evidence, and a conclusion based on reason. The requirement that an administrative body determine the existence or nonexistence of the necessary facts before any decision is made meets the essential requirements of due process. . . .

Whether or not a person has been deprived of due process of law by the action of an administrative agency or body depends on whether it acted contrary to the statutes and rules and with arbitrary and unreasonable discrimination. Denial of due process occurs where the exercise of power by an administrative officer or body is arbitrary or capricious, where a decision of a board or commission is based on mere guesswork as to an essential element (internal footnotes omitted).⁷

In *Adams*⁸, the Kansas Supreme Court stated:

In 73 C.J.S., Public Administrative Bodies and Procedure, § 132, pp. 456-458, we find the essential elements of an administrative hearing summed up in this way:

³ Kan. Const. Bill of Rights, § 18.

⁴ *Collins v. Kansas Milling Co.*, 207 Kan. 617, 485 P.2d 1343 (1971).

⁵ *Johnson v. Brooks Plumbing, LLC.*, 281 Kan. 1212, 135 P.3d 1203 (2006).

⁶ *Crease v. Vezers Precision Industrial Constructors International, Inc.*, No. 1,035,775, 2007 WL 4662039 (Kan. WCAB Dec. 7, 2007).

⁷ 73 C.J.S. Public Administrative Law and Procedure, § 123; See also *Johnston Coal & Coke Co. v. Dishong*, 198 Md. 467, Syl. ¶ 5, 84 A. 2d 847 (1951); *Kaufman v. Kansas Dept. of SRS*, 248 Kan. 951, 811 P.2d 876 (1991); *Peck v. University Residence Committee of Kansas State Univ.*, 248 Kan. 450, 807 P.2d 652 (1991); *Kansas Racing Management, Inc. v. Kansas Racing Comm'n*, 244 Kan. 343, 770 P.2d 423 (1989).

⁸ *Adams v. Marshall*, 212 Kan. 595, 601-02, 512 P.2d 365 (1973).

'An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or . . . full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. . . .'

The constitutional requirements of due process are applicable to proceedings held before an administrative body acting in a quasi-judicial capacity.⁹ Additionally, the Workers Compensation Act itself requires that the parties to a claim be afforded a reasonable opportunity to be heard and present evidence. While K.S.A. 44-523(f) does not specifically require a hearing or notice of a hearing, K.S.A. 44-523(a) provides in part:

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

The parties were notified that a prehearing settlement conference would occur on June 4, 2014. While there is no record of what occurred at the prehearing settlement conference, it appears respondent advised the judge the claim should be dismissed based on K.S.A. 44-523(f). Respondent may have made an oral motion to such effect, but the Board cannot tell. While K.S.A. 44-523(f) says nothing about the need to file a motion or hold a hearing prior to a claim being dismissed, appellate precedent suggests that due process requires claimant be given a meaningful opportunity to be heard. Claimant, through his brief, basically alleges being unaware – going into the prehearing settlement conference – that his claim might be dismissed. The Board agrees claimant did not receive reasonably calculated notice that respondent was seeking dismissal of this claim or that the judge might dismiss this claim.

We vacate the Order. To be perfectly clear, it appears the judge reached the right conclusion. K.S.A. 2006 Supp. 44-523(f) requires dismissal of a claim that has “not proceeded to final hearing, a settlement hearing, or an agreed award . . . within five years from the date of filing an application for hearing” Claimant makes no comment about the claim not having proceeded to a final hearing, settlement hearing or agreed award within five years from the time the application for hearing was filed. Absent some evidence to the contrary, it appears the judge’s decision was correct. However, the Board concludes claimant is entitled to his day in court after being notified in advance of respondent’s

⁹ *Davenport Pastures v. Board of Morris County Comm’rs*, 291 Kan. 132, 139, 238 P.3d 731 (2010); *Nguyen v. IBP, Inc.*, 266 Kan. 580, 972 P.2d 747 (1999).

request to dismiss the case under K.S.A. 2006 Supp. 44-523(f). Such advance notice would address at least some of claimant's due process concerns. Claimant's concern that he did not properly have his day in court would be ameliorated and rendered moot. While the judge's future decision may be the same result previously reached, claimant is entitled to due process – including forearmed knowledge as to what the hearing concerns¹⁰ – prior to review by the Board.

As an aside, claimant's concern whether the judge may dismiss his claim with or without prejudice is not at issue, as the judge did precisely what the statute contemplates: dismiss the claim. The judge did not specify whether the claim was being dismissed with or without prejudice.

CONCLUSIONS

WHEREFORE, the June 5, 2014 Order of Dismissal is vacated. Claimant is entitled to advance and meaningful notice of any future hearing regarding dismissal of his claim. Either the claimant, respondent or the judge may set it for hearing regarding potential dismissal under K.S.A. 2006 Supp. 44-523(f).

IT IS SO ORDERED.

Dated this _____ day of July 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

¹⁰ See *Walker v. UPS Freight*, No. 1,030,832, 2008 WL 2354925 (Kan. WCAB May 14, 2008).

DISSENT

The undersigned Board Members respectfully dissent. *Bergstrom*¹¹ makes it clear that using plain meaning when interpreting statutes is paramount. K.S.A. 2006 Supp. 44-523(f) says the judge shall dismiss a case that has not proceeded to a final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing. Over seven years and three months passed between the time claimant filed his application for hearing and the date of the Order of Dismissal. Claimant did not file for an extension of time within the five years allowed to seek an extension for good cause. Remanding this case will not change those facts. Remanding the case is simply placing form over substance.

We dissenters would either affirm the judge's decision or have the parties present oral argument to the Board, specifically to address whether there is any reason this claim should not have been dismissed.

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¹¹ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).